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In The

Supreme Court of the United States

October Term, 1992

ARTHUR JONES,

Petitioner,

vs.

AMERICAN BROADCASTING COMPANIES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should deny certiorari in this diversity case, where, as here, (1) the court of appeals correctly decided that under applicable Florida law the broadcast in suit was not defamatory and, therefore, concluded correctly, that it was unnecessary to consider the federal constitutional question, which the petitioner seeks to assert in this Court, regarding the scope of protection to be accorded statements in the broadcast under *Milkovich*, and (2) the case does not otherwise present *any* consideration set forth in this Court's Rule 10 which governs the Court's exercise of its discretionary review authority upon applications like petitioner's.

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STATEMENT OF THE CASE AND FACTS

This is the petitioner's second request in this Court for a writ of certiorari to review the judgment of the court below. When the petitioner was here last, in June of 1990, this Court had just decided *Milkovich v. Lorain Journal Co.*, 479 U.S. 1, 110 S. Ct. 2695 (1990). The petitioner claimed that *Milkovich* applied to his case, which was a defamation suit based upon a segment from ABC's 20/20 television program entitled "Save the Elephants." The segment in question, which aired on March 12, 1987, related how some of the herd of baby elephants which Jones had airlifted from Africa in 1984 began to be sold off after a time on Jones' farm in Ocala, Florida. ABC responded (1) that, as the lower courts had found, the broadcast was not defamatory of Jones (Respondent's Brief in Case No. 89-1952 at 12-13);[1] in the language of the applicable state law on defamation, only Jones' "tortured" and "unreasonable" interpretation of the broadcast made it defamatory, and (2) that, in any event, the statements attacked by Jones were protected opinion under *Milkovich* and related decisions of this Court. (App. at 18-20).

Consistent with its traditional practice of directing reconsideration of a case where a pending petition appears to raise issues generally similar to those just addressed by the Court in a plenary decision, the Court remanded the case to the Eleventh Circuit "for further consideration" in light of *Milkovich*. *Jones v. American Broadcasting Companies, Inc.*, ___ U.S. ___, 111 S. Ct. 239

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[1] Attached as an appendix ("App.") to this response. (App. at 16-17).

(1990). As one lower court has put it, the Court "merely 'flagged' this case as one upon which [this Court's] intervening decision may have some bearing. . . . " *Bush v. Lucas*, 647 F.2d 573, 575 (5th Cir. 1981), *aff'd*, 462 U.S. 367 (1983); *see also United States v. M.C.C. of Florida, Inc.*, 967 F.2d 1559, 1562 (11th Cir. 1992) (A "vacation," such as the one here, was not a ruling that the Court's new decision "actually affected the outcome" of the case but rather an "instruc[tion]" that the lower court "make that determination." The lower court "was free to adopt any or all of [its prior ruling] that, upon reconsideration, it determined to be unaffected by [the Supreme Court's intervening decision]."); *see generally* Arthur D. Hellman, *The Supreme Court's Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held for Plenary Decisions*, 11 Hastings Const. L. Q. 5, 19 (1984) ("[A] general similarity of issues and a surface inconsistency in results will usually suffice to persuade the Justices to remand a case rather than deny review.")

Upon such further consideration, the Eleventh Circuit reaffirmed its ruling that the case was properly dismissed upon summary judgment because the broadcast was not defamatory under state law. *Jones v. American Broadcasting Companies, Inc.*, 961 F.2d 1546, 1547 (11th Cir. 1992). The court of appeals, therefore, concluded correctly, that it was unnecessary to consider the constitutional issue of whether the statements attacked should also be immune from suit as protected opinion under *Milkovich*. 961 F.2d at 1547.

In the course of its per curiam opinion, the Eleventh Circuit quoted with approval this language from the district court's opinion:

> " 'Taken in context and without giving the broadcast any 'tortured' interpretation, . . . a reasonable person would not have interpreted the broadcast, in whole or in part, as being defamatory to [petitioner].' "

Id.

Because this finding of "no defamation" – which is concedely a matter of state law – "logically precede[d]" the district court's further finding of "non-actionable opinion" and because, as the Eleventh Circuit put it, "[o]nly the latter finding . . . arguably could be affected by the Supreme Court's opinion in *Milkovich*," the court of appeals saw no reason to reconsider its prior affirmance of the district court's judgment which it concluded, correctly, rested "on the alternate, and logically prior, [state law] ground of absence of defamation." 961 F.2d at 1547.

Jones says that the court of appeals misread the district court's ruling on defamatory meaning. However, the language from the district court's opinion, quoted by the court of appeals, could not be more direct or unambiguous. Moreover, as Jones knows, the very first legal issue presented to the district court – which Jones himself helped formulate and to which he stipulated in a joint memorandum to the court (R2-52) – was whether, "[u]nder Florida law . . . ," the "statements made in the broadcast [were] reasonably capable of a defamatory meaning." Pet. at 4; 4-5. The lower courts have now decided this state law issue against Jones three times, confirming, contrary to the assertion in the "Question" Jones presents to this Court (Pet. at i), that the broadcast simply does not contain statements accusing Jones of

"hypocrisy, lying, unscrupulousness and cruelty to animals," just as ABC has argued repeatedly and successfully since the inception of this lawsuit.[2]

Jones' chief claim in this Court is that the finding of "no defamation" was error (Pet. at i *passim*), and based upon that assumed error, Jones urges that the lower court further erred by "ignor[ing]" and "sidestepp[ing]" *Milkovich* and "refus[ing]" to apply the *Milkovich* analysis to the case. Pet. at 3, 7, & 13. In support of his reargument on defamatory meaning, Jones incorporates in his present petition the statement of facts about the broadcast contained in his prior petition to this Court. Pet. at 2. As ABC pointed out in response to the prior petition (App. at 13), Jones' account of the broadcast included cutting and pasting of statements in the broadcast to sustain Jones' claims of falsity and defamation. An accurate summary of what was in fact said in the broadcast is set forth in ABC's earlier brief at pages 1 through 10. (App. at 5-14). Also, for some reason, Jones twice tells this Court, completely inaccurately, that ABC "insisted discovery was necessary to determine defamatory meaning." Pet. at 4 n.2 & 11. In fact, ABC sought and obtained protection against discovery because the determination of defamatory meaning was solely a question of law for the court to decide (R2-31), a point to which Jones later stipulated (R2-52; 694 F. Supp. at 1548), and which he thereafter acknowledged at oral argument in the Eleventh Circuit upon the first appeal in this case.

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[2] *Jones v. American Broadcasting Companies, Inc.*, 694 F. Supp. 1542, 1553 (M.D. Fla. 1988), *aff'd*, 893 F.2d 1342 (11th Cir. 1989), *cert. granted, judgment vacated, case remanded for further consideration*, 111 S. Ct. 239 (1990), *aff'd on remand*, 961 F.2d 1546, 1547 (11th Cir. 1992).

As the authorities and brief argument which follows demonstrate, this Court does not sit to review questions of state law and certainly avoids, where it can, resolution of constitutional issues that are not necessary to the disposition of a case. This case clearly does not require or warrant resolution of any federal issue, much less one of public importance; nor does it invoke any other consideration set forth in this Court's Rule 10, which governs the Court's exercise of its discretionary power of review. To the contrary, this case is merely a local law dispute raising issues of interest to the litigants only, which has been repeatedly decided, correctly and fairly, against the petitioner by the lower courts. Nothing about this case warrants additional review by this Court pursuant to its extraordinary, and necessarily limited, discretionary review authority.

ARGUMENT

THE PETITION SHOULD BE DENIED BECAUSE THE ENTIRELY CORRECT RESULT BELOW – THAT THE BROADCAST IN SUIT WAS NOT DEFAMATORY AS A MATTER OF LAW – DOES NOT PRESENT A FEDERAL QUESTION OF ANY KIND, MUCH LESS A SUBSTANTIAL ONE, FOR THIS COURT'S REVIEW OR OTHERWISE INVOKE ANY CONSIDERATION IN THIS COURT'S RULE 10, WHICH GOVERNS PETITIONS LIKE THE PRESENT ONE, BUT RATHER RESTS EXCLUSIVELY UPON AN INTERPRETATION OF STATE LAW.

Rule 10 of this Court, which lists the considerations governing review on writs of certiorari, like petitioner's, recites in pertinent part:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons that will be considered:
>
> > (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> * * *

It is apparent from the plain language of Rule 10 that *none* of the considerations relevant to a review by this Court of the decision below are present here: there is no "conflict" between or among circuits and none is asserted; nor is a "federal question" involved; and there has certainly been no "depart[ure] from the accepted and usual course of judicial proceedings. . . . " Upon a plain reading of Rule 10, therefore, the petition should be denied.

While the list in Rule 10 is neither exhaustive nor controlling, there are no special or important reasons in this case for a different result. To the contrary, the chief claim of the petitioner is simply that the court below

erred in its application of the law. In the first place, the petitioner's claim of error is totally lacking in merit. Considered as a whole, unedited by Jones, the broadcast was in no way defamatory of Jones, as the lower courts have already decided three times. Nor was there any improper "sidestepping" of *Milkovich*. *See, e.g., Lapkoff v. Wilks*, 969 F.2d 78, 81 (4th Cir. 1992) (The application of *Milkovich* standards to allegedly defamatory statements is unnecessary where, as here, "the statements are not defamatory under state law."). Indeed, it would be alien to the practice and procedure of this Court, and federal courts generally, to reach out, as the petitioner would have this Court do here, and decide constitutional issues which are not necessary to the disposition of the case. *In re Snyder*, 472 U.S. 634, 642, 105 S. Ct. 2874, 2880 (1985).

Furthermore, of equal importance here, this Court is not, and never has been primarily concerned with the correction of perceived errors alleged to have been made by lower federal courts. *Boag v. MacDougall*, 454 U.S. 364, 366, 102 S. Ct. 700, 701 (1982) (O'Connor, J., concurring) ("[T]his Court is not equipped to correct every perceived error coming from the lower federal courts. The effectiveness of this Court rests in part on its practice of deciding cases of broad significance and of declining to expend limited judicial resources on cases, such as the present one, whose significance is limited to the parties. In exercising our discretionary certiorari jurisdiction, we should not be influenced solely by the merits of the petitioner's case."); *Watt v. Alaska*, 451 U.S. 259, 275, 101 S. Ct. 1673, 1682 (1981) (Stevens, J., concurring) ("Today [the courts of appeals] are in truth the courts of last resort for almost all federal litigation. . . . Most certainly, this Court does

not sit primarily to correct what we perceive to be mistakes committed by other tribunals."); *Ross v. Moffitt*, 417 U.S. 600, 616-17, 94 S. Ct. 2437, 2446-47 (1974) ("This Court's [direct certiorari] review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

This is especially true in diversity cases, like this one, which involve an alleged misinterpretation of state law. *Lapkoff v. Wilks*, 969 F.2d at 81 (In defamation cases, like this case, "state law . . . determin[es] whether the statements were, in fact, defamatory."). In such cases, certiorari is routinely denied. R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.2, at 194-95 (6th ed. 1986) ("[T]he [Supreme] Court[] lack[s] . . . interest in reviewing diversity cases where the only certiorari ground is an alleged conflict with applicable state law."); Mark R. Kramer, Comment, *The Role of Federal Courts in Changing State Law: The Employment At Will Doctrine in Pennsylvania*, 133 U. Pa. L. Rev. 227, 233 (1984) ("The Supreme Court routinely denies certiorari to cases involving misinterpretation of state law by the federal courts."); William M. Landes & Richard A. Posner, *Legal Change, Judicial Behavior, and the Diversity Jurisdiction*, 9 J. Legal Stud. 367, 373 (1980) ("[T]he Supreme Court rarely – if ever, in modern times – reviews diversity cases.").

The lower court properly disposed of the case upon remand in this matter, and this Court's denial of certiorari upon Jones' fourth bite at the apple is very clearly warranted. Each time this case has been considered on the merits, the petitioner's contentions have been fully considered and properly rejected. Litigation over the matter should now come to rest.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The television program in suit simply does not contain any statements or accusations like those embodied in Petitioner's "Questions Presented." Rather, the program consists entirely of facially non-defamatory statements or figurative expressions of speech wholly protected by the First Amendment and not actionable, as this Court just confirmed in the case of *Milkovich v. Lorain Journal Co.*, 58 U.S.L.W. 4846 (U.S. June 21, 1990).

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STATEMENT OF THE CASE AND FACTS

Petitioner Arthur Jones seeks to associate himself closely with the *Milkovich* result as if it were similar. *Milkovich,* however, bears no resemblance to this case on its facts, and the Court's decision there confirms the correctness of the result below. *Milkovich* involved a statement in a newspaper column that the Petitioner there had "lied at [a court] hearing . . . after having given his solemn oath to tell the truth." 58 U.S.L.W. at 4847 As this Court found, the foregoing statement could be read to include the provable factual assertion that Petitioner Milkovich had committed the crime of perjury. 58 U.S.L.W. at 4851. The present case, which involves a segment of ABC's 20/20 television program entitled "Save the Elephants", presents no remotely similar statements. In particular, as the lower courts found, the broadcast in suit contained no statements accusing Jones of "hypocrisy, lying, unscrupulousness [or] cruelty to animals", contrary to the implication in the "Question" Jones presents to this Court. Pet. 1. Indeed, the actual phrase of chief concern to the Petitioner – a portion of a lead-in to the segment referring to a "promise" to "some baby African elephants" that "was not kept" – is exactly the sort of figurative expression repeatedly confirmed by this Court, most recently in *Milkovich* itself, 58 U.S.L.W. at 4851, as absolutely protected by the First Amendment and not actionable.

A. THE BROADCAST IN SUIT

Over the years, Jones, an acknowledged public figure, has invited and received media attention and

repeated press coverage in publications such as *The Wall Street Journal, Newsweek, Business Week, Forbes, Playboy* and *Time*. He was the subject of a report on the television program "Lifestyles of the Rich and Famous." *Jones v. American Broadcasting Companies, Inc.*, 694 F. Supp. 1542, 1545 (M.D. Fla. 1988). He is the inventor of the Nautilus exercise machines, which he describes as a "thinking man's barbell". At one time Jones hosted a national television series entitled "Wild Cargo", and he produced hundreds of films for television of his exploits with wild animals. R1-20-Exh. B at 5, 6, 9, 14. The coverage of Jones has not been limited to his business affairs, but has also covered aspects of his colorful personal life. 694 F. Supp. at 1545.

In 1984, Jones transported sixty-three baby African elephants from Zimbabwe to his Ocala, Florida farm, "Jumbolair," aboard one of his 707 jet airliners. Respondent accompanied Jones on that trip, and Jones fully cooperated in the production of a 1984 "20/20" broadcast about it entitled "The Flying Elephants." The report also pictured Jones' airlift of the baby elephants back to Jumbolair.

The herd resided on Jones' Ocala estate until about July 21, 1986, when the elephants began to be dispersed pursuant to an agreement signed with David Meeks of the Little Mountain Zoological Park in Inman, South Carolina. 694 F. Supp. at 1545.

The 1987 segment of "20/20" that was the subject of this lawsuit was a follow-up to the 1984 broadcast. Entitled "Save the Elephants," it reported on what had happened to the elephants after Jones brought them to Florida in 1984.

The segment was preceded by these lead-ins:

HUGH DOWNS: Good evening, I'm Hugh Downs.

BARBARA WALTERS: And I'm Barbara Walters. And this is 20/20.

* * *

DOWNS [voice-over]: * * * and in 1984, these baby elephants walked into our hearts when 20/20 reported how this Florida millionaire airlifted them to safety. Now the herd must be disbanded, and their future is in doubt. Are we all at fault?

> PAT DERBY, Elephant Expert: What we do to animals in general is not wonderful; what we do to elephants is horrible.

DOWNS [voice-over]: Roger Caras asks if the dream has gone sour, and why its time again to save the elephants.

* * *

WALTERS: Well, later in this program, we'll follow up on the fate of some baby African elephants to whom a promise was not kept. * * *

* * *

DOWNS: * * * , but next, they say elephants never forget, but sometimes people, unfortunately, do. Roger Caras reports why it may be time once again, to "Save the Elephants." Stay with us.

694 F. Supp. at 1546; Pet. A-16-17.

One of Jones' principal contentions in this Court is that Barbara Walters' statement concerning a "promise to baby elephants" that "was not kept" constitutes a defamatory statement of fact about Jones for which he is

entitled to damages. Indeed, Jones draws the Court's attention specifically and particularly to the portion of the district court's opinion examining this contention. Pet. 15-16. The statement in question, standing alone and in the context of the broadcast, was under any analysis a statement of pure opinion, and the district court so concluded. 694 F. Supp. at 1552-53.

The 1987 segment proceeded with this introduction by host Hugh Downs:

> It's been almost three years now since 20/20 first reported on this man, eccentric Florida millionaire and inventor of the Nautilus exercise machines, Arthur Jones, and his daring airlift rescue of a herd of baby African elephants marked for death. It was one of the most talked about segments we've done here. But, as ABC News nature and wildlife correspondent Roger Caras tells us, what we thought was the happy ending to this elephant story is actually, according to the experts, the beginning of a sad and painful journey. 694 F. Supp. at 1546; Pet. A-17-18.

Roger Caras began the next portion of the segment by summarizing and showing excerpts from the 1984 broadcast. Caras first showed a section of the 1984 interview with Jones, in which Jones explained: "I simply could not live with myself if I idly stood by and watched the African elephants become extinct." Caras recounted the "dramatic scene at the time Jones airlifted the elephants from Africa to Florida in 1984," and stated that at that time, "his commitment seemed both emotional and financial." 694 F. Supp. at 1546; Pet. A-18-19.

Caras stated that Jones gave the impression in 1984 that the elephants would spend the rest of their lives at his ranch. An excerpt from the 1984 interview was replayed, in which Jones stated: "We're going to give them an opportunity to survive and to build a self-sustaining herd of African elephants in this country." 694 F. Supp. at 1546; Pet. A-20.

Caras next reported that "[f]or two and a half years, the Zimbabwe orphans lived the good life here on Arthur Jones' estate in central Florida. But all of that's coming to an end. The herd is now being dispersed." Caras quoted Pat Derby, identified as an "experienced elephant handler," who said that splitting up the herd was "a terrible mistake, that nature intended elephants to live in family groups." Derby stated:

> These are extremely social animals. They live for each other, literally, and when you pull a baby elephant out of that situation, that's stressful in itself. I've known of elephants to die just from that. 694 F. Supp. at 1546-7; Pet. A-20-1.

Caras reported "that Jones' elephants got the very best of care from keepers and veterinarians" while on Jones' ranch, but that 31 of the elephants which had started out on Jones' ranch had "gone someplace." The segment then quoted Jones' contention that "the elephants were sold by someone else" while he was selling his Nautilus business, a time when he says that he "lost total control of all of [his] assets." 694 F. Supp. at 1547; Pet. A-21-2.

Caras also reported that Ward International Corporation, the company that had purchased Nautilus, said it never sold any elephants and that the agreement to sell

the elephants to an animal dealer named David Meeks was signed by Jones' foreman, Ralph Cramer. Caras again quoted Ms. Derby, who said that Ralph Cramer had told her "that Arthur had told him to dispose of as many elephants as he could." 694 F. Supp. at 1547; Pet. A-22-3.

Before broadcasting the segment, ABC had inquired of Ward International about Jones' statements regarding his "loss of control." James E. Bonney, Ward's executive vice president, responded in writing:

> When Ward . . . assumed control, efforts were already under way [*sic*] to thin the elephant herd. The previous owners had an agreement with Mr. David Meeks to assist in placing the animals with suitable zoos and wildlife parks. R1-20-Exh. D

Mr. Bonney's letter was shown on camera during the broadcast.

Jones contends that the foregoing back and forth about the disposition of the elephants labelled Jones a liar. Pet. 34-6. That contention never withstood scrutiny, and was rejected by the courts below. Indeed, it is clear that this portion of the segment simply reported what each side had said on the subject of the conceded dispersal of the elephants.

Nor was the exchange defamatory of Jones. Regardless of who actually initiated the sale, it is conceded that the elephants began to be dispersed. The opinion of the broadcast was that the herd should not have been dispersed. However, the "villain" of the piece, to use Jones' phrase, was the "system" not Jones: As Hugh Downs asked rhetorically in the lead-in, "Are we all at fault?" The same view was taken by Pat Derby with whom, to

put it mildly, Jones takes exception. In the "outtake" interview of Derby, Roger Caras asks Derby to identify the villain. She replies: "The villain of this piece is our system." Pet. A-154-55.

Unstated by Jones, but undisputed, is that Ms. Derby has over 25 years experience handling both African and Asian elephants, R1-20-Exh. F at 214-15, is the author of a book, *The Lady and Her Tiger* (Dutton 1976), which details her experiences with nontraditional animals, including elephants, and was entrusted by Jones himself with one of his own baby elephants when it became ill. Jones 6/19/87 dep. at 45-6. Jones, a ninth-grade dropout, has endorsed practical, hands-on experience, like Ms. Derby's, as the best way to acquire expertise about elephants. *Id.* at 56. ABC, of course, inquired into Ms. Derby's qualifications prior to the broadcast. R1-20-Exh. F at 214-15.

In the next portion of the broadcast, Caras reported on what had happened to some of the elephants after they were sold to David Meeks. Caras noted that, when the elephants left Jones' ranch, their first stop was Meeks' Little Mountain Zoological Park in Inman, South Carolina. From there they went to various other places. Caras continued:

> Meeks says he tries to find good homes for the elephants, but good homes are hard to find for animals who may be 12 feet tall, weigh eight to ten tons and be able to walk through concrete walls. And what kinds of homes has Meeks chosen so far? Three elephants, at least, went to private individuals as pets. Eight to small animal parks and circuses not checked out by

> Meeks. The sales were made over the telephone. And one to an animal trainer who Meeks himself admitted to 20/20 uses cruel training techniques. All these are perfectly legal transactions. The problem is, an elephant, once stripped of its herd, dumped so to speak, will become extremely dangerous if not properly handled. 694 F. Supp. at 1547; Pet. A-111.

None of this is disputed. Caras then again quoted Pat Derby:

> So many dumped elephants become quote "rogues," because they're mishandled, they're the victims of improper diet, of every kind of atrocity in the world. Their only way to retaliate, they do one of two things, they either attack or they run. 694 F. Supp. at 1547; Pet. A-111-12.

Caras next reported on what had happened to one particular elephant:

> I don't imagine a baby elephant has the kind of mind that harbors expectations, but if one did, I don't think that any one of the elephants David Meeks sold expected to end up here, in Davenport, Florida, at the Liebel Family Circus. But one was sent here. It died just after a few months. Mr. Liebel's previous elephant died too. 694 F. Supp. at 1547-48; Pet. A-113.

This, also, is undisputed. The broadcast again quoted Pat Derby, who said that caring for the herd is "his [Jones'] responsibility. That herd was brought over here as a herd, and it should remain a herd." It likewise reported Jones' statement: "It was never our intention to keep them all, it was impossible; but if we could have saved them, certainly no harm done." Ms. Derby also stated: "I really feel they should have been destroyed in Africa. It's a quick death. They would have been with their own herd. They

would not have known. To send them into anything else is not kind." 694 F. Supp. at 1548; Pet. A-114-115.

The segment concluded with Mr. Caras summarizing the specific requirements of caring for elephants:

> CARAS [voice-over]: Jones says he doesn't know how many more he will sell, what the optimum herd size may be. Taking responsibility for 96 elephants, a herd that at maturity would weigh between 850 and 900 tons, require 4600 gallons of drinking water and 32,000 pounds of food a day, could be likened to climbing onto a tiger, and Arthur Jones, commenting on elephant ownership in general, said the advice of Confucius might apply.
>
> MR. JONES: "He who chooses to ride the tiger should carefully determine in advance how he intends to dismount." 694 F. Supp. at 1548; Pet. A-115.

In his petition, Jones lifts and repositions a portion of Caras' statement about future sales of elephants to construct his claim of falsity and defamation. Pet. 35. This cutting and pasting, which Jones also did in the courts below, is reason enough to deny his petition here. The full statement, in any event, is accurate. Jones said, as ABC reported, that "it was never our intention to keep" all the elephants, and, just as Caras stated, Jones expressly acknowledged in his "outtake" interview with ABC, unreported by Jones here, the possibility of a "dispos[ition]" of elephants in the future to determine an "optimum" herd size. R1-20-Exh. F at 36-7. In fact, as his foreman Cramer acknowledged, Jones had much earlier directed Cramer to "investigate the elephant market for the purpose of selling [elephants]" and, after the program

aired, obtained additional license authority to sell elephants. Cramer Dep. at 83-88; 97-116 and related exhibits.

Mr. Caras and Ms. Walters then concluded the broadcast:

> WALTERS: He who chooses to bring over a herd of elephants should carefully think of what he's going to do after he has them in his backyard, shouldn't he?
>
> CARAS: Barbara, it's no different than going to a pound and adopting a dog or a cat. If you're rich enough to go to Africa and bring a herd of elephants then your responsibility [is] for the life of the animals, and elephants live 60 to 70 years. He's a very rich man. He should endow these animals, give them to a university, keep them together so they can be studied and they can be cared for long after he's dead and we're dead.
>
> WALTERS: What would it cost?
>
> CARAS: Millions, but he's got the millions – $5 million, $10 million. And if not, maybe someone in the audience will come up with the money, but clearly, they should not be dissipated like that. We just got word that six more are being sent to a circus in Mexico. It's a fate worse than death.
>
> WALTERS: You know, we forget, isn't it cute, we're going to have all these elephants, and we're going to adopt these dogs or these cats, but we don't think of the next day. Thank you for bringing this to our attention. Let's hope that something can be done about it.
>
> CARAS: Thank you, Barbara, thank you, Hugh. 695 F. Supp. at 1548; Pet. A-115-17.

B. PROCEEDINGS BELOW

After "Save the Elephants" was televised on March 12, 1987, Jones, in a letter dated March 16, 1987, demanded that ABC retract the contents of the broadcast, asserting that the "sting" of the broadcast was that it had falsely labeled Jones a "wacky screwball". R1-20-Exh. A at 29-32. A few days later Jones sued ABC, claiming the March 12 broadcast had caused him $1 billion in actual damages. He sought an additional $3 billion in punitive damages. R1-1.

ABC moved for summary judgment on November 6, 1987. Jones filed his response on April 18, 1988, for the first time complaining that the lead-ins to the broadcast, including the "promise to elephants" phrase of which Jones makes so much in this petition, was defamatory. 694 F. Supp. at 1545. At the district court's direction the parties on June 8, 1988, filed a joint memorandum delineating the disputed and undisputed issues of fact and law necessary to decide the motion.

On September 7, 1988, the district court granted ABC's motion for summary judgment and ordered that the action be dismissed with prejudice. The district court's opinion, reported at 694 F. Supp. 1542, reflects a careful and painstaking examination of Jones' contentions.

As a result of its examination, the district court concluded that a reasonable person would not have interpreted the broadcast, in whole or in part, as being defamatory to Jones. The court concluded that the broadcast could not reasonably be interpreted as labelling

Jones a liar, a cheat, dishonest, a man who breaks promises, an animal abuser, a hypocrite, a "wacky screwball," inhumane, or a man who acted with ulterior motives. 694 F. Supp. at 1548-1553. Consistent with this Court's decision in *Milkovich*, the district court also found that several of the challenged statements – including the lead-in about a "promise to baby elephants" – were "pure opinion" which did not imply " 'concealed or undisclosed set of defamatory facts' " but, rather, were statements based upon undisputed facts or facts to which Jones had stipulated. 694 F. Supp. at 1550-51, 1552-53.

Following Jones' appeal, the Eleventh Circuit, after oral argument, affirmed on December 21, 1989. A rehearing of the appeal was denied on February 27, 1990. This petition followed on May 25, 1990.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The petition should be denied because the broadcast simply does not contain the statements or accusations embodied in the "Question Presented".

The "Question Presented" by Petitioner assumes that the television broadcast in suit contains statements accusing him of "hypocrisy, lying, unscrupulousness and cruelty to animals." Pet. 1. The broadcast simply does not contain any such statements. Petitioner's interpretation of the broadcast is "tortured and unreasonable", as the lower courts correctly concluded. The best proof of the correctness of the lower courts' conclusion is the broadcast itself. Considered as a whole, unedited by Jones, it

illustrates quite plainly that the factual predicate for Jones' charges in this Court is simply absent.

Jones acknowledges as much by his reliance on facially non-defamatory statements, which he edits and rearranges (see discussion above at 9-10), and matters outside the broadcast itself to support his contentions. Pet. 31-7. It is enough to say that Jones' attempt to impart by extrinsic proof a defamatory connotation not carried by the natural meaning of the words used is impermissible. *Southard v. Forbes, Inc.*, 588 F.2d 140, 144-46 (5th Cir. 1979), *cert. denied*, 444 U.S. 832, 100 S.Ct. 62 (1979) (Tuttle, J.); *Tellier-Wolfe v. Viacom Broadcasting, Inc.*, 134 A.D.2d 860, 521 N.Y.S.2d 597, 598 (N.Y. App. Div. 1987). In *Milkovich*, the statement in question was clearly defamatory and actionable unless it was deemed protected opinion. Here, the statements complained of are facially non-defamatory. Only Jones' unreasonable interpretation of them puts them in issue.

ABC cannot be held liable "for broadcasting truthful statements and actions because it failed [in Jones' opinion] to include additional facts which might have cast [Jones] in a more favorable or balanced light." *Machleder v. Diaz*, 801 F.2d 46, 55 (2d Cir. 1986), *cert. denied*, 479 U.S. 1088, 107 S.Ct. 1294 (1987). The exercise of editorial judgment is a First Amendment right which may be curtailed only when "the press so oversteps its editorial freedom that it contains falsity and does so with the requisite degree of fault." *Id.* Respondent has not in any way at all exceeded or abused its freedoms in this case.

2. *Milkovich* mandates denial of the petition or affirmance of the decision below because the challenged statements are clearly protected figurative expressions of speech and not actionable.

The snippet of the district court's opinion, 694 F. Supp. at 1552-53, with which Jones seeks to titillate this Court's particular interest, at pages 15 and 16 of his petition, refers to a "promise to baby elephants" which on its face and in the context of the broadcast is obviously a figurative expression of speech, by any measure or standard. As such, it is fully protected by the First Amendment.

This Court's decision in *Milkovich* makes the point. While declining to recognize a so-called "opinion privilege" in addition to existing protections of speech guaranteed by the First Amendment, the Court confirmed that statements of pure opinion, like the ones here, are nonetheless fully protected by existing First Amendment doctrine. As the Court explained, citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." 58 U.S.L.W. at 4851. The Court went on to review other decisions in which it similarly recognized constitutional limits, fully applicable in this case, on the type of speech which may be the subject of state defamation actions. *See* 58 U.S.L.W. at 4851, discussing *Greenbelt Cooperative Publishing Ass'n., Inc. v. Bresler*, 398 U.S. 6 (1970); *Letter Carriers v. Austin*, 418 U.S. 264 (1974); and *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988). As *Milkovich* itself and the *Bresler-Letter Carrier-Falwell* line of cases make clear, "loose,

figurative or hyperbolic language" that cannot reasonably be interpreted as stating actual facts about an individual is protected by the First Amendment. "This provides assurance," said the Court in *Milkovich*, "that public debate will not suffer for lack of" such imaginative or rhetorical forms of expression. 58 U.S.L.W. at 4851.

The *Bresler* case is instructive. There, the Court characterized as nonactionable the word "blackmail" as used to describe a land developer's negotiating position because "even the most careless reader must have perceived that the word was no more than rhetorical hyperbole . . . " 398 U.S. at 14, 90 S.Ct. at 1542. Quite obviously, the phrase "promise to baby elephants" is substantially less tantalizing than "blackmail" but equally, if not more, figurative and rhetorical in nature. The phrase hardly implied any actual contractual commitment, but like other statements in the broadcast, it merely reflected the opinion that dispersal of Jones' elephant herd was "not right." Statements of what is right or wrong, or moral or immoral, precisely because they involve infinitely debatable subjects, are not "provable as false" and plainly merit protection. *Held v. Pokorny*, 583 F. Supp. 1038, 1040 (S.D.N.Y. 1984) ("Indeed, the Court could not instruct the jury on how to evaluate the truth of a charge of immorality without entering an age old debate better left to philosophers.") The district court did no more than recognize this fact and in so doing ruled, consistent with *Milkovich*, that the statements in question contained no set of implied or "undisclosed" defamatory facts, and were, as a result, not actionable. 694 F. Supp. at 1553. Its ruling was correct and should remain undisturbed.

Finally, were this a close case, it would be relevant to observe that when the subject of the statement is a public figure or a matter of public concern, this fact, too, should be considered in evaluating whether the statement merits protection. As Justice O'Connor wrote in *Hepps*, "where the scales are in . . . an uncertain balance, we believe that the Constitution requires us to tip them in favor of protecting true speech . . . [t]o ensure that true speech on matters of public concern is not deterred. . . . " 475 U.S. at 776, 106 S.Ct. at 1564. *See also Ollman v. Evans*, 750 F.2d 970, 1002 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1127 (1985) (Bork, J. concurring).

This Court in *Milkovich* has just provided ample guidelines in the "opinion" area and has laid to rest any confusion that may have existed in the law and among the circuits on the subject. There is nothing at all about this case that warrants a revisit to the subject or otherwise merits the special attention of this Court other than simple application of the *Milkovich* principles and the consequent denial of this petition or affirmance of the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied or, more appropriately, this Court should affirm the decision of the court below.

Respectfully submitted,

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